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LITIGATION HIGHLIGHTS

Inside

Ninth Circuit En Banc Remands Case To BIA To Decide Whether Assault With Deadly Weapon Under California Law Is Categorically a CIMT

In ***Ceron v. Holder***, __F.3d __, 2014 WL 1274096 (9th Cir. March 31, 2014)(*en banc*) the Ninth Circuit held that a conviction for assault with a deadly weapon, in violation of California Penal Code section 245(a)(1) is a conviction "for which a sentence of one year or longer may be imposed" under INA 237(a)(2)(A)(i), but remanded the case to BIA to apply the categorical approach to determine whether the conviction is "a crime involving moral turpitude"

The petitioner, a citizen of El Salvador and an LPR, pleaded *nolo contendere* in California state court to having violated CPC § 245(a)(1), which proscribes "an assault upon the person of another with a deadly weapon or instrument other than a firearm." The state court suspended the imposition of a sentence and imposed, instead, 36 months of probation. As a term and condition of probation, the state court prescribed a 364–day jail term and gave petitioner credit for the 364 days that he actually served in the county jail

Subsequently DHS sought petitioner's removal under INA § 237(a)(2)(A)(i) on the basis that he had been convicted of a crime involving moral

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Anticipating Help In Challenging The Ninth Circuit "Divide and Conquer" Analysis In Adverse Credibility Cases

Introduction and Summary

The Ninth Circuit frequently uses the divide-and-conquer technique to overturn agency adverse credibility determinations. The court separates and rejects as non-determinative each of the factors identified by the agency, refusing to instead examine the totality of the circumstances.

In *United States v. Arvizu*, 534 U.S. 266 (2002), the Supreme Court unanimously rejected this approach in the criminal law context. A Ninth Circuit panel had suppressed evidence found by a Border Patrol agent in a vehicle stop and leading to a drug conviction. In reversing, the Supreme Court held that, given the "totality of the circumstances," there was "reasonable suspicion" to justify the stop. Recently, in a similar case, the Ninth Circuit, sitting *en banc*, overwhelmingly reversed a panel that used the divide-and-conquer approach to suppress evidence. *United States v. Valdes-Vega*, 738 F.3d 1074 (2013)(*en banc*).

Valdes-Vega has been granted an extension of time until May 8, 2014, to file a petition for certiorari. Assuming the *en banc* decision is not reversed by the Supreme Court, OIL attorneys are encouraged to cite it in petition for review cases where Ninth

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Challenging "Divide and Conquer" Analysis In Adverse Credibility Cases

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Circuit panels attempt to apply the divide-and-conquer technique to overturn asylum denials based on adverse credibility findings. This is particularly appropriate where the REAL ID Act applies, because that statute explicitly addresses "totality of the circumstances."

The Long-term Problem of Adverse Credibility in the Ninth Circuit

The Ninth Circuit routinely overturns asylum denials that should be upheld under the compelling evidence standard set forth in 8 U.S.C. 1252 (b)(4) and *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The court isolates the individual elements of the adverse credibility determination, discarding even partially flawed elements, and reweighing the evidence in light of any plausible alternative arguments.

This contrasts with the practice of other circuits, even in cases not covered by the REAL ID Act. *See, e.g., Diadjou v. Holder*, 662 F.3d 265, 278 (4th Cir. 2011)(cumulative effect of "seemingly minor and tangential inconsistencies" can justify adverse credibility finding); *Zine v. Mukasey*, 517 F.3d 535, 541 (8th Cir. 2008)(even where individual reasons are inadequate support, the issue is whether "their cumulative weight" is sufficient); *Pan v. Gonzales*, 489 F.3d 80, 86 (1st Cir. 2007) (although individual inconsistencies may "seem like small potatoes . . . their cumulative effect is great"); *Xiao Ji Chen v. U.S. DOJ*, 434 F.3d 144, 160 n.15 (2d Cir. 2006) ("the IJ did not err in stressing the cumulative impact" of the inconsistencies); *Yu v. Ashcroft*, 364 F.3d 700, 704 (6th Cir. 2004) (although minor inconsistencies about dates would alone be inadequate, "their cumulative effect gives support to the other grounds"); *Chun v. INS*, 40 F.3d 76, 78-79 (5th Cir. 1994) (upholding an adverse credibility finding based upon collective significance of inconsistencies). This problem has plagued government litigators for over 20 years.

In 1990, Judge Sneed noted developing problems in the circuit's asylum case law, including heightened obstacles to adverse credibility findings. *Mendoza Perez v. INS*, 902 F.2d 760, 764 (9th Cir. 1990) (Sneed, J., concurring specially). The government anticipated that first the Supreme Court's 1992 *Elias-Zacarias* decision, and later the 1996 IIRIRA amendments, would rein in the court's overreaching; only the passage of time revealed that the court would ignore both. Individual judges began dissenting with more frequency and a greater sense of urgency. *See, e.g,. Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (*en banc*) (O'Scannlain, Kleinfeld, JJ., dissenting); *Mgoian v. INS*, 184 F.3d 1029, 1037 (9th Cir. 1999) (Rymer, J., dissenting).

In 1990, Judge Sneed noted developing problems in the circuit's asylum case law, including heightened obstacles to adverse credibility findings.

The government responded by filing a series of rehearing petitions in a concerted effort to challenge the Ninth Circuit's judge-made rules, such as the "divide-and-conquer" analysis, that usurp the agency's factfinding authority. Although the Ninth Circuit denied our rehearing petitions, the effort produced a remarkable dissent in *Abovian v. INS*, 257 F.3d 971 (9th Cir. 2001), in which Judges O'Scannlain, Trott, T.G. Nelson, Kleinfeld, Graber, Tallman, and Rawlinson joined Judge Kozinski in soundly criticizing the court's approach.

In light of the Ninth Circuit's unwillingness to reconsider its credibility jurisprudence, the Solicitor General filed a petition for a writ of certiorari. *Chen v. INS*, 266 F.3d 1094 (9th Cir. 2001), *cert. granted, judgment vacated and remanded for reconsideration in light of INS v. Ventura*, 537 U.S. 1016, *on remand*, 326 F.3d 1316 (9th Cir. 2003). The Supreme Court's *vacatur* and remand for reconsideration in light of the *Ventura* ruling failed to persuade the Ninth Circuit to change its approach.

The Solicitor General subsequently asked the Ninth Circuit to reconsider and reject its credibility rules in response to a *sua sponte* call for the parties' views on whether the court should rehear *Suntharalinkam v. Keisler*, 506 F.3d 822 (9th Cir. 2007). The court granted *en banc* rehearing, but *Suntharalinkam* mooted out when the petitioner withdrew his petition following oral argument. Both adverse credibility losses and individual dissents continued.

The Supreme Court Condemns "Divide-and-Conquer" in *United States v.* Arvizu

A border patrol officer stopped a minivan about 30 miles from the Mexican border and found almost 130 pounds of marijuana, much of it under the feet of children sitting in the backseat. The district court denied the criminal defendant's motion to suppress the evidence.

A panel of the Ninth Circuit (Reinhardt, Politz (by designation), Hawkins, J.J.) reversed. It characterized the district court's analysis as relying on 10 factors and examined each one in turn. It held that seven of these, including failure to slow down or acknowledge the officer, the raised position of the children's knees, and their waving in unison (as

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Challenging "Divide and Conquer" Analysis In Adverse Credibility Cases

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if on command) at the officer carried little or no weight. and that the remaining three factors – the road's use by smugglers, the timing of the trip to coincide with the agents' shift change, and the use of minivans by smugglers – were insufficient to render the stop permissible.

The Supreme Court reversed the Ninth Circuit and affirmed the district court. The Supreme Court found that the "balance between the public interest and the individual's right to personal security . . . tilts in favor of a standard less than probable cause," *i.e.*, "reasonable suspicion." 534 U.S. at 273. A reviewing court must look at the "totality of the circumstances" and allow officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.* at 273.

The Supreme Court found the Ninth Circuit's "evaluation and rejection of . . . factors in isolation from each other does not take into account the 'totality of the circumstances'" and explicitly rejected the "divide-and-conquer analysis." *Id*. at 274. It held that it was "reasonable for [the agent] to infer from his observations, his registration check, and his experience as a border control agent. . . ." *Id.* at 277. It stated that "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct," *ibid.*, meaning that the possibility that each separate factor might relate to innocent conduct does not prevent their aggregate from giving rise to reasonable suspicion.

A Ninth Circuit Panel Misinterprets *Arvizu*

In 2012, a panel of the Ninth Circuit refused to apply *Arvizu* in a similar criminal case. *United States v. Valdes-Vega*, 685 F.3d 1138 (9th Cir. July 25, 2012) (*Pregerson*, Murguia, J.J., Conlon, J., dissenting). An officer who had worked for the Border Patrol for eleven years stopped a truck about 70 miles from the border and found about 8 kilograms of cocaine. While giving lip service to *Arvizu* and quoting its language about the totality of the circumstances, the panel stated that "reasonable suspicion may not be based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped." 685 F.3d at 1144.

The panel organized the factors cited in support of reasonable suspicion into several subsets – proximity to the border and characteristics of the area, traffic patterns and behavior of the driver, and model and appearance of the vehicle – and then found each of little or no weight. *Id.* at 1144-47. The panel then observed that, "Putting aside the erratic driving, the description likely 'fit[s] hundreds or thousands of law abiding daily users of the highways of Southern California.'" *Id*. at 1148. It then found that adding erratic driving to the mix made no difference. *Ibid.* It stated that its analysis was not in conflict with *Arvizu* because, in its view, *Arvizu* "merely clarified that a proper totality of the circumstances analysis must not exclude facts that are minimally probative or are susceptible to innocent explanation. . . . We have not declined to consider any of the facts on which the Agents relied. . . Furthermore, we reject the dissent's suggestion that it is wrong to consider the strength of each fact individually before viewing them collectively." *Ibid.* "Here, the facts on which the agents relied are not highly probative, and this is one such case where, even when viewed together, they do not amount to reasonable suspicion." *Id.* at 1149.

"The nature of the totality-of-the circumstances analysis also precludes us from holding that certain factors are presumptively given no weight without considering those factors in the full context of each particular case."

The En Banc Ninth Circuit Reverses the Panel Decision in *Valdes-Vega*

After granting *en banc* rehearing and ordering that the panel decision not be cited, 714 F.3d 1134 (April 25, 2013), the *en banc* court found reasonable suspicion. 738 F.3d 1074 (Dec. 24, 2013) (Pregerson, Reinhardt, Thomas, J.J., dissenting). The court noted that reasonable suspicion requires more than a hunch but less than probable cause and "is not a particularly high threshold to reach." 738 F.3d at 1078.

The court observed that the correct approach "precludes a 'divide-and-conquer analysis' because even though each of the suspect's 'acts was perhaps innocent in itself . . . taken together, they [may] warrant[] further investigation." *Ibid.*, quoting *Arvizu,* 534 U.S. at 274. "The nature of the totality-of-the circumstances analysis also precludes us from holding that certain factors are presumptively given no weight without considering those factors in the full context of each particular case." 738 F.3d at 1079. Proper evaluation "cannot be done in the abstract by divorcing factors from their context in the stop at issue." *Ibid.* "And the facts must be filtered through the lens of the agents' training and experience." *Ibid.*

The *en banc* court stated that the district court's findings were not clearly erroneous and that, given the totality of the circumstances, "many of the facts found relevant by the district court are highly probative in our view as well." *Ibid.* "In light of the totality of the circumstances, giving due weight to the agents' experience and reasonable deductions, we

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hold that the agents had a reasonable, particularized basis. . . ." *Id.* at 1080. There is no need for an officer to rule out an innocent explanation; . . . [a] series of innocent acts may be enough for reasonable suspicion. . . ." *Ibid.* "We need not decide whether any single fact would be enough to support suspicion because we are not called upon to review single facts in isolation." *Id.* at 1081.

Assuming the Supreme Court Does Not Reverse the En Banc Decision in *Valdes-Vega*, It Should Be Applied To Challenge "Divide-and-Conquer" Analysis in Adverse Credibility Cases

The logic of *Arvizu*, which now has been endorsed by the *en banc* Ninth Circuit in the criminal law context, should apply equally to adverse credibility cases in the immigration context. Just as the experience and reasonable deductions of border patrol agents deserve to carry weight, so do the experience and reasonable deductions of immigration judges and BIA members.

The *en banc* court stated that "reasonable suspicion" is not a "particularly high threshold," and that "[w]e review reasonable suspicion determinations de novo, reviewing findings of historical fact for clear error and giving 'due weight to inferences drawn from those facts by resident judges and local law enforcement officers.'" 738 F.3d at 1077-78.

The threshold for according deference to agency adverse credibility findings should be even lower, because the substantial evidence standard – a more deferential standard – applies to them.

The threshold for according deference to agency adverse credibility findings should be even lower, because the substantial evidence standard – a more deferential standard – applies to them. By statute, "the administrative findings of fact [underlying an immigration petition for review] are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

The relevance of *Arvizu* is particularly strong in petition for review cases in which the REAL ID Act applies, *i.e.,* cases in which an application for asylum, withholding, and/or protection under the Convention Against Torture originally was filed on or after May 11, 2005. Section 101(a)(3)(B)(iii) of the REAL ID Act added new language to the INA on the subject of credibility determinations. That language begins: "Considering the totality of the circumstances, and all relevant factors. . . ." 8 U.S.C. 1158(b)(1)(B)(iii) (asylum). *See also* 8 U.S.C. 1231(b)(3 (C) (withholding); 8 C.F.R. 208.16 (b) (Convention Against Torture).

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USCIS Reaches FY 2015 H-1B Cap

USCIS announced on April 7 that it has received a sufficient number of H-1B petitions to reach the statutory cap of 65,000 visas for fiscal year (FY) 2015. USCIS has also received more than the limit of 20,000 H-1B petitions filed under the advanced degree exemption.

USCIS received about 172,500 H-1B petitions during the filing period which began April 1, including petitions filed for the advanced degree exemption. On April 10, 2014, USCIS completed a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and 20,000 cap under the advanced degree exemption. For cap-subject petitions not randomly selected, USCIS will reject and return the petition with filing fees, unless it is found to be a duplicate filing.

The agency conducted the selection process for the advanced degree exemption first. All advanced degree petitions not selected then became part of the random selection process for the 65,000 limit. On March 25, USCIS announced that they would begin premium processing for H-1B cap cases no later than April 28.

USCIS will continue to accept and process petitions that are otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted towards the congressionally mandated FY 2015 H-1B cap. USCIS will continue to accept and process petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States;
- Change the terms of employment for current H-1B workers;
- Allow current H-1B workers to change employers; and
- Allow current H-1B workers to work concurrently in a second H-1B position.

U.S. businesses use the H-1B program to employ foreign workers in occupations that require highly specialized knowledge in fields such as science, engineering, and computer programming.

Is Assault With Deadly Weapon Under California Law Is Categorically a CIMT?

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turpitude for which a sentence of one year or longer could have been imposed. The IJ ordered petitioner removed as charged. The BIA dismissed petitioner's appeal. The BIA first held that, whether Petitioner's conviction was for a misdemeanor or for a felony, the state statute permits a sentence of imprisonment of at least one year. The BIA next held that a conviction for an assault with a deadly weapon under CPC § 245(a)(1) categorically constitutes a crime involving moral turpitude.

Petitioner timely petitioned for review. The Ninth Circuit initially denied the petition, *Ceron v. Holder*, 712 F.3d 426 (9th Cir. 2013), but subsequently granted rehearing *en banc*, 730 F.3d 1133 (9th Cir. 2013).

The *en banc* court, applying *de novo* review, first held that even though petitioner was convicted of a wobbler offense, the conviction was for "a crime for which a sentence of one year or longer may be imposed." The court explained that under § 245(a)(1) a conviction can be for a felony or a misdemeanor, hence the "wobblers" designation. "If it was a felony, then the maximum penalty was imprisonment for four years in the state prison. If it was a misdemeanor, then the maximum penalty was incarceration for one year in the county jail. In either event -- four years or one year -- the state court could have imposed 'a sentence of one year or longer,'" said the court. The court overruled two prior decisions that had held otherwise (*Garcia –Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir.2003) and *Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir.2004)) because they "misunderstood how the state law operates."

Second, the court determined that its decision in *Gonzales v. Barber*, 207 F.2d 398 (9th Cir. 1953), and the BIA's decision in *Matter of G-R-,* 2 I&N Dec. 733 (BIA 1946, A.G. 1947), which held that a conviction under CPC § 245 involved moral turpitude, "are no longer good law." The court found that the reasoning in those cases runs counter to the *Taylor v. United States*, 495 U.S. 575 (1990), categorical approach, and that significant developments in California law concerning the intent element of assault have undermined their reasoning.

In *Matter of G-R-*, the court determined, the BIA had examined the underlying facts of the alien's conviction to decide that it involved moral turpitude. Thus, the court reasoned, the agency did not decide that assault with a deadly weapon under CPC § 245(a)(1) categorically constitutes a CIMT. That analysis is 'now prohibited by the categorical approach" said the court.

The court observed that the use of a deadly weapon may not be sufficient to establish a CIMT and that other factors may suggest that the crime does not categorically involve a CIMT.

Similarly, the court further held that *Carr v. INS*, 86 F.3d 949 (9th Cir. 1996), is no longer good law for its holding that CPC § 245(a)(2) is not a categorical CIMT. In that case, the court held that assault with a firearm was not a CIMT, contradicting its earlier binding holding in *Barber*. "Carr violated our rule that, in the absence of an intervening Supreme court or en banc precedent that fatally undermines the case in question, a three judge panel is bound by an earlier precedential decision," said the court.

The court then considered hypothetically whether a conviction under CPC § 245(a)(2) is categorically a CIMT. The court noted that intent is a crucial element in determining whether a crime involves a CIMT, and also "the presence of an aggravating factor." It observed that the use of a deadly weapon may not be sufficient to establish a CIMT and that other factors may suggest that the crime does not categorically involve a CIMT. Nonetheless, the court found "prudent to remand this case to the BIA to consider the issue in the first instance."

Judge Bea concurred with the majority's analysis on its holding that the conviction was for "a crime for which a sentence of one year or longer may be imposed." Judge Bea, however, would have denied the petition for review, and dissented from the majority's application of the *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, (9th Cir. 2007), framework analyzing whether a crime falls into the category of crimes involving moral turpitude. Judge Bea wrote that a CIMT has no elements, and he would rather look to the weight of federal and state court authority pursuant to *Jordan v. De George*, 341 U.S. 223 (1951), to find that assault with a deadly weapon is a CIMT.

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NOTED

Smugglers try the horse trick

The Border Patrol is seeing an upsurge in bicycles and horses being used to smuggle humans across. Border Patrol agents have made arrests after noticing, for example, that two horses ridden into the parklands next to the border by two riders came back out with three riders. In another instance, one of two equestrians hanging around the border fence was poised to switch seats with an identically dressed illegal border crosser. (Source: *San Diego Reader*)

FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

The Supreme Court heard argument On December 10, 2013, based on the government's petition for certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio v. Mayorka***s, 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argued that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the BIA reasonably interpreted INA § 203(h)(3).

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BIA Standard of Review

Oral argument on rehearing was heard before a panel of the Ninth Circuit on September 9, 2013, in ***Izquierdo v. Holder,*** 06-74629, addressing the question of whether the Board the engaged in impermissible fact-finding when it ruled that the alien witnessed a human rights crime and made no effort to prevent it.

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Standard of Review Nationality Rulings

The Ninth Circuit granted *en banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder,*** 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same. On March 17, 2014, an *en banc* panel heard oral argument. The court had granted *en banc* rehearing over government opposition, and vacated the published prior panel decision, 718 F.3d 1075.

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Retroactive Application of Board Decisions

On January 6, 2014, the Ninth Circuit ordered the government to respond to the rehearing petition challenging its September 19, 2013 unpublished decision in ***Diaz-Castaneda v. Holder***, 2013 WL 5274401. The petition contends that petitioners are eligible for adjustment of status because the balancing of the *Montgomery Ward* factors tilts against applying *Matter of Briones* retroactively to their case, and the case should be remanded to develop the record on their reliance and equitable interests relating to the *Montgomery Ward* balancing test. The government opposed rehearing on January 27, 2014, arguing that the panel appropriately determined the *Montgomery Ward* factors in the first instance and therefore the panel decision suffered no error of fact or law to support rehearing.

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Ordinary Remand Rule

On September 12, 2013, the Ninth Circuit withdrew its March 22, 2013 opinion in ***Amponsah v. Holder***, 709 F.3d 1318, requested reports on the status of the BIA's present case reconsidering of the rule asserted in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and stated that the government's rehearing petition is moot. The rehearing petition had argued that the panel violated the ordinary remand rule when it rejected as unreasonable under *Chevron* step-2 the BIA's blanket rule against recognizing state *nunc pro tunc* adoption decrees entered after the alien's 16th birthday.

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Asylum – Internal Relocation

In ***Maldonado v. Holder***, No. 09-71491, the Ninth Circuit has ordered the parties to file supplemental briefs on whether case should be heard *en banc* in the first instance to consider: (1) whether there is a conflict in our case law between *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011), and *Hasan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004), regarding which party bears the burden of proof on internal relocation; and (2) whether *Hasan* and *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008), improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible." Simultaneous briefs by the parties are due April 30, 2014.

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Asylum – Credibility

The Ninth Circuit ordered the government to respond to the alien's petition for *en banc* rehearing in ***Li v. Holder***, 738 F3d 1160, on the question of whether the panel's use of "*falsus in uno, falsus in omnibus*" to uphold the adverse credibility finding inconsistent with the circuit's pre-REAL ID Act rulings requiring adverse credibility findings go to the heart of the claim. The government opposition to rehearing was filed March 21, 2014.

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Summaries Of Recent Federal Court Decisions

THIRD CIRCUIT

■ Third Circuit Denies Petition for Panel Rehearing of Holding that IIRIRA Does Not Disturb the Finality Rule for Direct Appeals of Criminal Convictions

In ***Orabi v. Att'y Gen.***, 738 F.3d 535 (3d Cir. March 27, 2014) (Smith, *Garth*, Sloviter), the Third Circuit held that the IIRIRA elimination of the finality requirement for deferred adjudications does not disturb the longstanding finality rule for direct appeals of criminal convictions recognized in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). Rehearing was sought because, in the interim, the Second Circuit, which handled the direct appeal of the alien's criminal conviction, affirmed the conviction, rendering the judgment final regardless of whether the majority's or the dissent's view of the requisite level of finality were to prevail. But the court concluded that, when it had issued its opinion, the criminal conviction had not become final, and the fact that the judgment later did become final would not require vacatur of the panel's previous judgment.

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■ Third Circuit Holds that State Arson Statute Must Contain Jurisdictional Element of Corresponding Federal Statute to Constitute an Aggravated Felony

In ***Bautista v. Att'y Gen. of the U.S.***, __ F.3d __, 2014 WL783019 (3d Cir. February 28, 2014) (Ambro, *Greenaway*, Jr., O'Malley), the Third Circuit vacated the BIA's published decision in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011). In *Bautista*, the BIA had held that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under INA §101(a)(43)(E)(i), even though the State crime lacks the jurisdictional element in the applicable Federal arson offense.

Applying the categorical approach, the Third circuit found that the New York statute under which petitioner was convicted did not match the elements of 18 U.S.C. § 844(i), the corresponding federal statute under the INA.

The court explained that in § 101(a)(43), the phrase "described in" is narrower than the phrase "defined in" and requires that an alien's state statute of conviction contain the jurisdictional element of 18 U.S.C. § 844(i) (arson involving interstate commerce) in order for a conviction to be "described in" § 844(i), and thus, constitute an aggravated felony. The court further concluded that the jurisdictional element could not be disregarded because the Supreme Court established that it was a substantive element of the offense.

The Third Circuit held that petitioner's participation in a smuggling scheme by transporting illegal aliens within the United States did not render him inadmissible pursuant to INA § 212(a)(6)(E)(i).

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■ Third Circuit Holds that Alien's Participation In Smuggling Scheme Transporting Illegal Aliens Within the United States Did Not Satisfy Requirements of Smuggling Bar

In ***Parra-Rojas v. Att'y Gen.,*** __ F.3d __, 2014 WL 1230001 (3d Cir. March 26, 2014) (*Rendell*, Roth, Barry), the Third Circuit held that petitioner's participation in a smuggling scheme by transporting illegal aliens within the United States did not render him inadmissible pursuant to INA § 212(a)(6)(E)(i) (the "smuggling bar").

The petitioner is a citizen of Colombia and an LPR. On November 16, 2009, he was stopped at the High Peaks checkpoint near North Hudson, New York, with two passengers in his car. Upon questioning, petitioner admitted that he was aware the two men were illegal aliens, and that he had picked them up in the Saint Regis Mohawk Reservation, on the U.S. side of the Canadian border. He stated that he was to be paid $1,000 to drive the men from the border region to locations in Queens, New York. He further admitted that he had performed such work on two prior occasions, and was generally paid approximately $500 per alien, plus expenses. Subsequently, petitioner was convicted of bringing in or harboring aliens for financial gain, in violation of INA § 274(a)(2)(B)(ii).

On August 22, 2011, DHS charged petitioner with removability under INA § 237(a)(2)(A)(iii), for having committed an aggravated felony as defined by INA § 101(a)(43)(N), which specifically includes conduct under § 274(a)(2). Petitioner then applied for adjustment of status. DHS argued that petitioner's conviction under § 274(a)(2)(B)(ii) rendered him inadmissible under § 212(a)(6)(E)(i), which provides that, "an alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is inadmissible." An IJ found petitioner removable as charged and ineligible for adjustment of status. On appeal the BIA held that petitioner had not met his burden to show that he was not inadmissible under § 212(a)(6)(E)(i).

In reversing the BIA, the court said that there was no evidence that petitioner performed any act encouraging, facilitating, or otherwise relating to the aliens' entry into the United States. To be held inadmissible for

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having "encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States," under § 212(a)(6)(E)(i), "an individual must have performed one of these actions with respect to the actual entry of an alien into the United States" said the court. Here, explained the court, "he record contains no indication that Petitioner knew or had contact with any of the aliens prior to transporting them after they had already been dropped off inside the United States."

The Third Circuit held that the BIA improperly rejected or discounted the petitioner's localized evidence and the reports of the U.S. Congressional-Executive Commission on China regarding China's family planning policy.

The court ruled that the alien's underlying conduct involved only transporting aliens from the United States side of the Canadian border to New York City after they had illegally entered the country. Thus, the court concluded there was no assistance with entry.

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■ **Third Circuit Holds that BIA Failed to Meaningfully Consider Petitioner's Motion to Reopen Evidence**

In ***Zhu v. Att'y gen. of the U.S.***, 744 F.3d 268 (3d Cir. 2014) (Smith, *Shwartz*, Scirica), the Third Circuit held that the BIA improperly rejected or discounted the petitioner's localized evidence and the reports of the U.S. Congressional-Executive Commission on China regarding China's family planning policy.

The petitioner, a Chinese citizen from the Fujian Province, was denied asylum by an IJ and the BIA on the basis that she lacked credibility. In 2002 she filed a motion to reopen alleging that, since the time of the IJ's decision, she had married and given birth to a son, and would be forcibly sterilized if she returned to China. The BIA denied the motion. In 2008, she filed a second motion to reopen alleging that she had given birth to two more children and that conditions had changed in China, alleging the Chinese government now counted children born overseas when considering violations of its population control policies. The BIA denied the motion because petitioner's documentation showed no material change in country conditions.

On January 14, 2013, petitioner filed a third motion to reopen, this time with voluminous documentation that she asserted demonstrated a "material change" in China's enforcement of its population control policies in her home region. The BIA denied this motion as well, concluding that petitioner failed to establish a material change in country conditions and had not demonstrated a *prima facie* case for CAT protection.

In vacating the BIA's denial, the court said it could not discern why the BIA had discounted the petitioner's unauthenticated documents, and held that the BIA's rejection of evidence "outside [her] hometown and county" was inconsistent with past decisions. "The BIA did not meaningfully address many of the documents," said the court. The court noted that petitioner had submitted more than 85 documents, spanning over 1,000 pages. The court held, however, that it was not an abuse of discretion for the BIA to reject the "expert opinion" of Dr. Flora Sapio, which was submitted to establish authenticity. "Unlike other evidence it inexplicably discounted, the BIA explained why it rejected reliance on the expert's opinion," said the court.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds Notice to Appear Initiates Stop-Time Rule Even When It Contains Later Substituted Charge of Removal**

In ***Urbina v. Holder***, __ F.3d __, 2014 WL 998324 (4th Cir. March 17, 2014) (Matz, Agee, *Diaz*), the Fourth Circuit deferred to *Matter of Carrillo*, 25 I&N Dec 644 (BIA 2011), and affirmed that the service of a Notice to Appear, even one containing a later substituted charge of removal, is sufficient to trigger the stop-time rule for purposes of cancellation of removal eligibility. The court also ruled that 8 C.F.R. § 1240.10 (e), which permits the DHS to amend charges, was not arbitrary, capricious, or manifestly contrary to the statute.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds Petitioner Was Properly Found Removable For Aiding and Abetting an Improper Entry**

In ***Santos-Sanchez v. Holder***, __ F.3d __, 2014 WL 902868 (5th Cir. March 7, 2014) (*Graves*, King, Clement), the Fifth Circuit held that the BIA properly determined that the alien's conviction for aiding and abetting improper entry under INA § 275(a) established his removability pursuant to INA § 237(a)(1)(E)(i). The court rejected the alien's argument that the judgment of conviction did not specify the particular section of §275(a) under which he was convicted, concluding that his conviction documents were sufficient to establish that his conduct established removability.

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SIXTH CIRCUIT

■ Sixth Circuit Holds that One-Strike Rule Bars Adjustment of Status for Aliens with Prior Fraudulent Marriage Findings

In ***Foythong v. Holder***, 743 F.3d 1051 (6th Cir. 2014) (Daughtrey, *Sutton*, Donald), the Sixth Court held that INA § 204(c) imposes a one-strike rule - after one prior finding of a fraudulent marriage the immigration authorities must reject all future efforts towards adjustment of status based on marriage to a U.S. citizen.

The "statute imposes a one-strike rule, meaning that, after one prior finding of a sham marriage, the immigration authorities must reject all future efforts at an adjustment of status based on marital status."

The petitioner, a native of Thailand, first married a U.S. citizen in 2004, when he was still married to his wife in Thailand. USCIS found the marriage fraudulent. The BIA upheld this finding and ordered petitioner removed. Petitioner sought to reopen his removal proceedings and adjust his status based on a second marriage to a United States citizen, and third marriage as well. Petitioner claimed that he had legally and properly divorced his first wife back in Thailand, and married his third wife. The BIA denied the motion on the ground that he had little probability of success in view of his prior sham marriage.

In upholding the denial of the motion to reopen, the court explained that the "statute imposes a one-strike rule, meaning that, after one prior finding of a sham marriage, the immigration authorities must reject all future efforts at an adjustment of status based on marital status. That prohibition ends the discussion."

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SEVENTH CIRCUIT

■ Seventh Circuit Holds that Courts Have Exclusive Jurisdiction Over Naturalization Applications

In ***Aljabri v. Holder***, __ F.3d __, 2014 WL 931115 (7th Cir. March 11, 2014) (*Wood*, Bauer, Kanne), the Seventh Circuit held that when an applicant for naturalization files a cause of action seeking adjudication of a naturalization application by the district court under INA § 336(b), that court has exclusive jurisdiction over the naturalization application unless and until the matter is remanded to USCIS. The court reversed the district court's dismissal for lack of subject matter jurisdiction and concluded that the case was not moot after USCIS denied the petitioner's naturalization application because he filed the cause of action.

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■ Seventh Circuit Holds Failure to Show Reasonable Unavailability of Corroborating Evidence Fatal to Credible Petitioner's Withholding of Removal Claim

In ***Chen v. Holder,*** 744 F.3d 527 (7th Cir. 2014) (Rovner, Williams, *Tinder*), the Seventh Circuit held that even though the IJ found petitioner credible, it was proper to require corroborating evidence because the testimony was not sufficiently persuasive.

The petitioner, a citizen of China, entered the U.S. in October 2004 as a nonimmigrant visitor with authorization to stay until April 2005. He overstayed and later filed an application for asylum, withholding of removal, and CAT protection. Petitioner testified that he left China in 2004 because he was persecuted by the Chinese government because he "participated in the demonstration against the Chinese government using violence to force people to . . . demolish the housing and to force people to move." Petitioner owned a shop in a market but the government made plans to develop that area and to demolish the existing structures. He said that because of his actions he was detained, beaten, harassed, and threatened by the police. Other than one sit-in protest of the demolition of the market shops, petitioner had not participated in any other anti-government demonstration and he had never been a member of any political organization.

The IJ did not find petitioner "incredible" but because of inconsistencies in his testimony, she did not find that his testimony was sufficiently persuasive and required him to provide corroborative evidence. The IJ determined that petitioner's situation was best characterized as a personal dispute rather than an expression of his political opinion and denied withholding. The IJ also denied asylum finding no extraordinary circumstances to excuse the untimely filing of his application. The BIA agreed that petitioner had insufficient evidence to establish that he more likely than not would be tortured upon return to China and dismissed his appeal.

Preliminarily the court found that it lacked jurisdiction to review either the untimeliness of petitioner's application for asylum or that there were no extraordinary circumstances to excuse his late filing.

Next, the court held that the petitioner's failure to show that he could not have reasonably obtained corroborating evidence was fatal to his application for withholding. The court agreed that the Chinese government's alleged mistreatment of peti-

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tioner due to his protest of the government's taking was not on account of an actual or perceived political opinion, but arose out of a private dispute between the alien and the government.

The court explained that petitioner "did not engage in any of the classic examples of political activity; instead, he participated in one sit-in to protest the taking of his property without compensation. The sit-in was public, and Chen was accompanied by other merchants who complained about the taking of their property, but that is insufficient to compel the conclusion that political opinion was the reason for any harm to him."

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■ **Seventh Circuit Holds that Immigration Judges Have Jurisdiction to Consider Waivers of Inadmissibility for U Visa Applicants**

In ***L.D.G. v. Holder***, __ F.3d __, 2014 WL 944985 (7th Cir. March 12, 2014) (Hamilton, Kanne, *Wood*), the Seventh Circuit considered whether the USCIS has exclusive jurisdiction over waivers of inadmissibility necessary to obtain a U visa. The court determined that INA § 212 (d)(14) is not the only means by which an applicant can obtain such a waiver because § 212(d)(3)(A), subject only to explicit exceptions, grants the Attorney General the authority to waive inadmissibility.

The court held that the two sections coexist, and thus, the IJ incorrectly declined jurisdiction in concluding that USCIS alone has jurisdiction to grant an inadmissibility waiver for purposes of a U visa.

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■ **Seventh Circuit Holds that Petitioner Established Past Persecution and Well-founded Fear of Future Persecution on Account of Protected Ground**

In ***N.L.A. v. Holder***, 744 F.3d 425 (7th Cir. 2014) (Flaum, *Rovner*, Castillo), the Seventh Circuit rejected the agency's finding that petitioner's fear of persecution from the FARC was a derivative claim. The court concluded that petitioner had demonstrated direct past persecution and a well-founded fear of future persecution because FARC had attempted to coerce petitioner into supporting them by threatening to harm petitioner's relatives.

The court also ruled that "Colombian land owners who refuse to cooperate with the FARC" was a cognizable social group.

The court also ruled that "Colombian land owners who refuse to cooperate with the FARC" was a cognizable social group.

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■ **Seventh Circuit Determines BIA Failed to Provide Sufficient Reasoning to Reject Petitioner's Asylum Claim**

In ***R.R.D. v. Holder***, __ F.3d __, 2014 WL 1045131 (7th Cir. March 19, 2014) (*Easterbrook*, Manion, Hamilton), the Seventh Circuit remanded asylum claim for the BIA to reassess whether petitioner, a former investigator for Mexico's Federal Agency of Investigation, has a well-founded fear of future persecution because of his membership in the proposed social group of "honest former law-enforcement agents in Mexico."

The IJ determined that petitioner had been threatened repeatedly by drug traffickers and remained at risk, but concluded that the drug traffickers targeted him because he hampered their organizations, not because he was in a social group of honest cops. The BIA agreed.

The court rejected the BIA's determination the petitioner failed to establish persecution on account of a particular social group. The court explained that being a former agent is an immutable characteristic because nothing petitioner "can do will erase his employment history." The court also noted that the BIA "must analyze rather than ignore material evidence" and determined that the BIA failed to mention record evidence suggesting that drug-trafficking organizations locate and kill police officers who resign from their positions. "Punishing people after they are no longer threats is a rational way to achieve deterrence; indeed, the United States itself does this," said the court.

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■ **Seventh Circuit Upholds Denial of Withholding of Removal Where Petitioner's Claim of Persecution Was Not Credible or Corroborated**

In ***Tian v. Holder***, __ F.3d __, 2014 WL 961531 (7th Cir. March 13, 2014) (Easterbrook, Williams, *Tinder*), the Seventh Circuit upheld the BIA's withholding denial where the petitioner failed to provide any evidence to corroborate his otherwise implausible claim of political persecution in China. The court noted that petitioner waived any challenge to the BIA's determination that his claim was implausible, and

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agreed with the BIA's merits determination.

The court also held that it lacked jurisdiction to review the BIA's determination of no changed or extraordinary circumstances to excuse petitioner's late filing for asylum, and determined that a summary reference to "UNCAT relief" in the alien's Notice of Appeal was insufficient to exhaust a challenge to the denial of protection under CAT.

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EIGHTH CIRCUIT

■ Eighth Circuit Holds Petitioner's Inconsistencies and Evasive, Non-Responsive Demeanor Provided Substantial Evidence Supporting BIA's Adverse Credibility Determination

In ***Li v. Holder***, __ F.3d __, 2014 WL 960949 (8th Cir. March 14, 2014) (*Webber*, Wollman, Shepherd), the Eighth Circuit held that the BIA correctly determined that the alien was not credible in light of inconsistencies between the alien's allegations of persecution in China in his asylum interview, written statements, and testimony before the IJ. The court also held that the alien's "non-responsive and evasive manner of testifying, especially when asked to reconcile some inconsistencies in his testimony" provided further support for the adverse credibility determination.

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■ Asylum Applicant Failed to Establish Nexus Between Persecution and Protected Ground and Failed to Demonstrate Government's Willful Blindness to Torture

In ***Somoza Garcia v. Holder***, __ F.3d __, 2014 WL 1044950 (8th Cir. March 19, 2014) (*Gruender*, Bright, Kelly), the Eighth Circuit held that the petitioner, a citizen of Guatemala, did not show that his past persecution was on account of political opinion. The court also found that petitioner's proposed social group, "young Guatemalan men who have opposed MS-13, reported the gang to the police, and faced increased persecution as a result," lacked particularity and social visibility. Lastly, the court held that the record did not compel the conclusion that the Guatemalan government was willfully blind to petitioner's mistreatment as it showed that the government attempts to control gangs.

The court found that petitioner's proposed social group, "young Guatemalan men who have opposed MS-13, reported the gang to the police, and faced increased persecution as a result," lacked particularity and social visibility.

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■ Aiding and Abetting Third-Degree Assault Under Minnesota Law is Crime of Violence and Supports BIA's Decision Precluding Felons From Seeking a § 212(h) Waiver

In ***Roberts v. Holder***, __ F.3d __, 2014 WL 1062930 (8th Cir. March 20, 2014) (Bye, Smith, Benton) (*per curiam*), the Eighth Circuit held that aiding and abetting third-degree assault under Minn. Stat. § 609.223.1 categorically qualifies as a crime of violence under 18 U.S.C. § 16(a) and deferred to the BIA's interpretation in *Matter of Rodriguez*, 25 I &N Dec. 784 (BIA 2012), that a waiver under INA § 212(h) is unavailable to an alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, without regard to the manner in which such status was acquired. The court determined that the existence of a circuit split regarding the interpretation of INA § 212(h) does not violate due process or equal protection.

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■ Immigration Judge's Refusal to Admit Cumulative Testimony Did Not Violate Due Process

In ***Zeah v. Holder***, 744 F.3d 577 (8th Cir. 2014) (*Bye*, Smith, Benton), the Seventh Circuit held that the IJ did not violate petitioner's due process rights by refusing to admit cumulative testimony and, even if a procedural error had occurred, the alien failed to show prejudice.

The petitioner, a Nigerian citizen who had been denied a visa on a petition filed by her husband on the basis of an alleged prior sham marriage, was placed in removal proceedings because she was not in possession of a valid entry document. She conceded removability, but sought cancellation of removal.

The IJ heard two days of testimony, including that of petitioner, her husband, her adult son, and that of a doctor. The IJ refused to hear the testimony of J.R., who was then nine years of age, but allowed petitioner to make an offer of proof. J.R. would have testified to his mother being his caretaker. Petitioner then sought to admit testimony from her adult daughter Kafayat. The IJ rejected the testimony because it would have been cumulative with the testimony of other family members. The IJ accepted an offer of proof regarding Kafayat's proposed testimony. The IJ denied cancellation, determining that petitioner failed to prove a family member would suffer exceptional or extremely unusual hardship if she were removed. The IJ also denied relief as a matter of discretion. The BIA affirmed and found no error in excluding testimony from J.R.

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and, that even if the IJ had erred in excluding expert testimony, petitioner was not prejudiced as testimony about conditions in Nigeria was irrelevant as J.R. would stay in the United States.

In rejecting the due process claim, the court explained that "when there has already been credible testimony, there is no due process violation when an IJ refuses to admit cumulative and unnecessary evidence." While the BIA did not reach the IJ's denial of relief as a matter of discretion, the court noted that it lacked jurisdiction to review any claim that the IJ erred by weighing factors relevant to petitioner's cancellation of removal application.

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NINTH CIRCUIT

Ninth Circuit Holds CHSC § 11377(a) is Divisible Under *Descamps* and That Petitioner was Convicted of a Controlled Substance Offense Under Modified Categorical Approach

In *Coronado v. Holder*, __ F.3d __, 2014 WL 983621 (9th Cir. March 14, 2014) (Benavides, Bybee, *Nguyen*), the Ninth Circuit held that petitioner conviction for possessing methamphetamine in violation of California Health & Safety Code § 11377(a) rendered him inadmissible under INA § 212(a)(A)(i)(II). Applying *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), the court concluded that § 11377(a) is a divisible statute, and thus, the agency properly applied the modified categorical approach. However, the court determined that remand was warranted because the BIA failed to address in the first instance petitioner's due process claims alleging ineffective assistance of counsel and bias by the IJ.

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Ninth Circuit Holds that Regulatory Procedural Requirements Apply to Untimely CAT Motions to Reopen

In *Go v. Holder*, 744 F.3d 604 (9th Cir. 2014) (*Wallace*, Graber, Mills (by designation)), requiring the Ninth Circuit held that the procedural requirements set out in 8 C.F.R. § 1003.2(c) – a showing of changed conditions or circumstances in the country of removal – apply to untimely motions to reopen where the alien requests protection under the CAT, even though the regulation does not refer to CAT.

The court held that the BIA did not abuse its discretion in denying petitioner's motion to reopen because the evidence did not show "worsening" conditions or "changed circumstances."

In a previous proceeding, petitioner, a citizen of the Philippines, had applied for asylum, withholding of removal, and protection under the CAT. After the BIA denied those claims, the Ninth Circuit denied his petition for review in *Go v. Holder*, 640 F.3d 1047 (9th Cir. 2011).

The court held that the BIA did not abuse its discretion in denying petitioner's motion to reopen because the evidence did not show "worsening" conditions or "changed circumstances."

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Ninth Circuit Holds that Approval of a Form I-130 Does Not Create Vested Right to Apply for Adjustment of Status by Alien Subject to Reinstatement of Removal

In *Montoya v. Holder*, __ F.3d __, 2014 WL 902930 (9th Cir. March 7, 2014) (*Farris,* Smith, Watford), the Ninth Circuit held that the IIRIRA's bar applications for relief filed by aliens subject to reinstatement of removal did not have an impermissibly retroactive effect on an alien who was merely the beneficiary of an immigrant visa petition which had been filed and approved prior to IIRIRA. The court explained that petitioner herself did not take any action prior to IIRIRA which might have elevated her expectations for adjustment of status "above the level of hope."

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Ninth Circuit Holds that BIA Did Not Engage in Improper Fact-finding in Vacating IJ's Grant of Withholding of Removal

In *Perez-Palafox v. Holder*, __ F.3d __, 2014 WL 931245 (9th Cir. March 11, 2014) (Fletcher, *Rawlinson*, Hellerstein), the Ninth Circuit held that it had jurisdiction to review as a question of law, whether the BIA engaged in improper fact-finding in determining that the alien committed a particularly serious crime, despite the applicability of the criminal review bar under INA §242 (a)(2)(c).

The petitioner, a citizen of Mexico, was admitted to the United States as an immigrant at the age of six. On April 16, 1990, he was convicted in a California state court of the felony offense of Possession for Sale of a Controlled Substance in violation of California Health & Safety Code § 11351, and sentenced to three years' probation, with the first 180 days to be spent in county jail. Five days after his conviction, petitioner became an LPR.

On April 5, 2001, the former INS charged petitioner with removability pursuant to INA § 237(a)(2)(A)(iii), as an alien convicted of an ag-

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gravated felony. Petitioner was found removable as charged but was granted withholding. In 2006, petitioner was convicted in a California state court of the felony offense of Sale/Transportation of a Controlled Substance and was sentenced to three years' imprisonment. The government then filed a motion to reopen to terminate the grant of withholding. An IJ found that the conviction documents DHS submitted did not establish that petitioner was convicted of a "drug trafficking" offense, and denied the government's motion to terminate the prior grant of withholding. Following a remand, the IJ found that the government failed to establish by a preponderance of the evidence that petitioner's conviction constituted a particularly serious crime. The BIA reversed the IJ concluding that petitioner's conviction in 2006 was a "particularly serious drug offense posing a significant danger to the community." The BIA noted that its conclusion was made pursuant to its authority to review *de novo* whether the facts establish eligibility for relief.

The Ninth Circuit rejected petitioner's contention that the BIA had engaged in impermissible fact-finding. The court noted that the BIA specifically stated that it reviewed the IJ's factual findings for clear error and applied the *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), factors to the facts found by the IJ. "We have consistently held that application of the *Frentescu* factors to the underlying facts is a legal conclusion and not a factfinding endeavor," said the court.

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■ **Ninth Circuit Holds that Alien's Conviction Was Not Offense Relating to a Controlled Substance**

In ***Ragasa v. Holder***, 743 F.3d 688 (9th Cir. 2014) (Hawkins, Mckeown, Bea), the Ninth Circuit held that it would deny the alien's citizenship claim in a forthcoming decision, but granted the petition for review because his Hawaii state conviction does not constitute a predicate offense for purposes of removability under INA § 237(a)(2)(B)(i).

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■ **Ninth Circuit Holds Non-Responsiveness, Hesitant Demeanor, and Lack of Detail Provided Substantial Evidence for Agency's Adverse Credibility Determination**

The court held that the BIA correctly determined that the petitioner's claim of persecution in China was not credible based on petitioner's demeanor, where the IJ documented instances of non-responsiveness and hesitation.

In ***Huang v. Holder***, __ F.3d __, 2014 WL 949118 (9th Cir. March 12, 2014) (*Ikuta*, Farris, Fernandez), the Ninth Circuit held that the BIA correctly determined that the petitioner's claim of persecution in China was not credible based on petitioner's demeanor, where the IJ documented instances of non-responsiveness and hesitation.

The petitioner, who entered the United States on a student visa, claimed persecution on account of her Christian religion. She claimed that while attending an underground Christian "house church" in China, she was arrested and taken to the police station where she was mistreated and forced to sign a document promising that she would discontinue participating in underground Christian activities. The IJ determined that petitioner's demeanor undermined her credibility, noting that she paused frequently while testifying "as if to assess the impact of the answer she provided." Further, the IJ found that petitioner's testimony was "extremely superficial," and "could easily have been memorized." The IJ also noted that much of petitioner's testimony was unpersuasive and not supported by reasonably obtainable corroborating evidence. The BIA affirmed the IJ's ruling in full.

In upholding the adverse credibility finding, the court determined that the IJ complied with the statutory requirement of reviewing the record as a whole and that the petitioner's superficial testimony and lack of detail provided further support for the adverse credibility determination. The court stressed that the IJ's "well-supported demeanor findings are entitled to special deference."

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■ **Ninth Circuit Holds that Felony False Imprisonment under California Law Is Not Crime Involving Moral Turpitude**

In ***Turijan v. Holder***, 744 F.3d 617 (9th Cir. 2014) (*Vinson*, Silverman, Hurwitz), the Ninth Circuit held that felony false imprisonment is not a CIMT under California law because such a conviction does not require an intent to injure, an actual injury, or a protected class of victims.

The petitioner, a citizen of Mexico, was admitted into the United States as a lawful permanent resident in 2000. Less than five years later, he was charged in California state court with simple kidnapping in violation of CPC § 207(a). The petitioner later pled guilty to a lesser included offense of false imprisonment under CPC § 236. DHS then sought his removal under INA § 237 (a)(2)(A)(iii), but later amended the NTA charging petitioner under INA § 237(a)(2)(A)(i), for having been convicted of a CIMT within five years of his admission into the United States.

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Subsequently, the IJ terminated the hearing because DHS was not prepared to proceed after obtaining three earlier continuances, and concluded that DHS had failed to carry its burden and provide "guidance as to why this is a crime involving moral turpitude." On appeal the BIA reversed, finding that the statutorily-required aggravated factors of violence, menace, fraud, and deceit "necessarily indicate a state of mind that [categorically] falls within the definition of a crime involving moral turpitude."

In reversing the BIA, the court explained that California courts have interpreted the felony false imprisonment statute to reach conduct that, while meeting the definition of menace under state law, falls short of the generic definition of "moral turpitude," as the term has been defined in the court's case law. "Because 'the full range of conduct prohibited by the statute' does not fall within the definition of that term, felony false imprisonment under California law is not a categorical CIMT," said the court. Moreover, the court also noted that in *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1218 (9th Cir. 2013), it held that simple kidnapping under CPC § 207(a) is not a categorical CIMT. "Obviously, if the crime with which the petitioner was originally charged is not a categorical CIMT, *a fortiori*, the lesser included offense to which he later pled guilty — which requires, if anything, an even lesser *mens rea* — is not a categorical CIMT either," explained the court.

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■ Ninth Circuit Affirms District Court's Dismissal of Petitioner's Claims that USCIS Failed to Adjudicate and Wrongfully Denied His "Arriving Alien" I-485 Application

In ***Vukov v. U.S. Dept. Homeland Sec.***, __ Fed Appx. __, 2014 WL 949267 (9th Cir. March 12, 2014) (Kozinski, Graber, Breyer), the Ninth Circuit affirmed the District Court for the Central District of California's dismissal of plaintiff's claims that the USCIS failed to adjudicate and wrongfully denied his "arriving alien" I-485 application. The court affirmed that USCIS's denial of the I-485 application rendered moot plaintiff's "failure to adjudicate" claims and that under 8 U.S.C. § 1252(a)(2)(B)(i), the district court lacked subject matter jurisdiction to review USCIS's discretionary denial of the I-485 application.

"The record evidence shows that, in Fujian Province, U.S.-born children are not counted towards the number of children allowed under China's family planning policy where the U.S.-born children are not registered as permanent residents in China."

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds that BIA Did Not Err by Declining to Give Weight to Asylum Applicants Unauthenticated Document

In ***Wu v. Holder***, __ F.3d __, 2014 WL 1012951 (11th Cir. March 18, 2014) (Carnes, *Hull*, Cox), the Eleventh Circuit upheld the BIA's denial of petitioners' asylum application, concluding that the BIA did not err by affording no weight their unauthenticated document indicating that they would be forced to undergo sterilization if returned to China.

The petitioners (Wu and Zhang) had been separately ordered removed in 1997 and 1999. After the issuance of these orders, they married in 1999 and had three U.S.-born children in 2000, 2002, and 2005, respectively. In 2004 and 2005, petitioners filed multiple motions to reopen their immigration cases and filed asylum applications claiming persecution, including sterilization, if returned to Fujian Province, China. The motions were denied, and in 2007, they again filed several motions to reopen their cases. The BIA granted petitioners' last 2007 motions to reopen and remanded their cases to the IJ to consider the authenticity of their evidence and for further consideration of their asylum claims. After a hearing, the IJ denied petitioners' asylum applications, and in 2012, the BIA dismissed their appeal.

In particular, the BIA determined that petitioners' did not satisfy the three-pronged test set forth in *Matter J-H-S-*, 24 I&N Dec. 196 (BIA 2007), namely, a showing that: "(1) the births [of her children] violated family planning policies in [her] local province or municipality, (2) the family planning policies are being enforced, and (3) current local family planning enforcement efforts would give rise to a well-founded fear of persecution due to the violation."

The court agreed that petitioner Wu did not show the existence of a policy that counted U.S.-born children towards the number of children allowed under China's family planning policy. "The record evidence shows that, in Fujian Province, U.S.-born children are not counted towards the number of children allowed under China's family planning policy where the U.S.-born children are not registered as permanent residents in China. Wu does not plan to register her children and even claims she cannot do so," explained the court.

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"Securing the Homeland – ICE" exhibit opens at Crime Museum in DC

The Crime Museum unveiled in March a new exhibit entitled "Securing the Homeland – ICE," offering insight into U.S. Immigration and Customs Enforcement (ICE) and its efforts to promote homeland security and public safety through the enforcement of more than 400 federal laws governing homeland security, customs, trade and immigration.

The exhibit educates the public on the role and work of ICE. Museum guests will have the opportunity to read about some high profile ICE cases, learn about the impact of counterfeit goods on U.S. security, understand how ICE protects our homeland, and test their knowledge of ICE at the Crime Museum.

"This exhibit provides ICE with a new venue to showcase how the dedicated men and women of this agency work to keep our nation and its people safe every day," said ICE Deputy Director Daniel Ragsdale. "As we protect America from the cross-border crime and unlawful migration that threatens public safety, we hope to inspire people to join our team and help us keep our nation safe."

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DISTRICT COURTS

■ **District of Massachusetts Denies Portability Where Original Employer No Longer In Business**

In ***Patel v. Johnson,*** No. 1:12-cv-12317 (D. Mass., March 11, 2014) (*Young, J.*), the District Court for the District of Massachusetts granted summary judgment to DHS and other defendants, holding that the original job offer must remain valid for an alien to be eligible to change jobs under the job portability provision. The court gave *Chevron* deference to USCIS's interpretation of the regulation that provides for automatic revocation of an I-140 visa when an employer ceases operations.

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■ **Eastern District of Pennsylvania Upholds USCIS Denial of Religious Worker Petition**

In ***Embassy of the Blessed Kingdom of God for All Nations v. Holder***, No. 13-cv-1041 (E.D. Pa. March 20, 2014) (*Barttle, J.*), the District Court for the Eastern District of Pennsylvania denied USCIS's motion to dismiss for lack of standing, instead granting summary judgment to the government. The court held that plaintiffs failed to meet the requirements to file an administrative appeal of the Form I-360 Special Immigrant Religious Worker Petition.

Even if the appeal had been properly filed, the court determined that the evidence did not support plaintiffs' claim that the beneficiary was coming to work for a *bona fide* non-profit religious organization affiliated with the religious denomination in the United States, because the evidence demonstrated several irregularities and divisions in the relationship between the Ukrainian Church, Embassy Sacramento, Embassy Philadelphia and the beneficiary.

In particular, the court noted that the "Government could not initially find Embassy Sacramento at its given address when it went looking for it. In addition, the Government found no existing church at the address for Embassy Philadelphia."

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

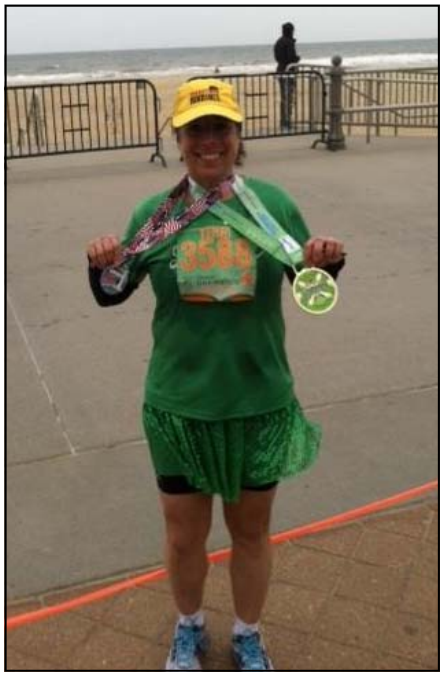
June 27 2014. Brown Bag Lunch & Learn with **Alvaro Vargas Llosa**, author of *Global Crossings: Immigration, Civilization, and America* (Independent Institute, 2013).

November 3-7, 2013. OIL 20th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. Attorneys from our client agencies and Assistant United States Attorneys are invited to attend.

Contact: Francesco.Isgro@usdoj.gov.

INSIDE OIL

Congratulations to OIL Assistant Director **Terri Scadron** who recently ran two marathons in one weekend! Terri ran the Rock-n-Roll USA marathon on Saturday in 5:09:42, and the Shamrock Marathon on Sunday in 5:08:59. "I now know that a double marathon weekend is just a 50 mile race with dinner and a nap in the middle," she said. Terri raised over $3100 for leukemia research and support.



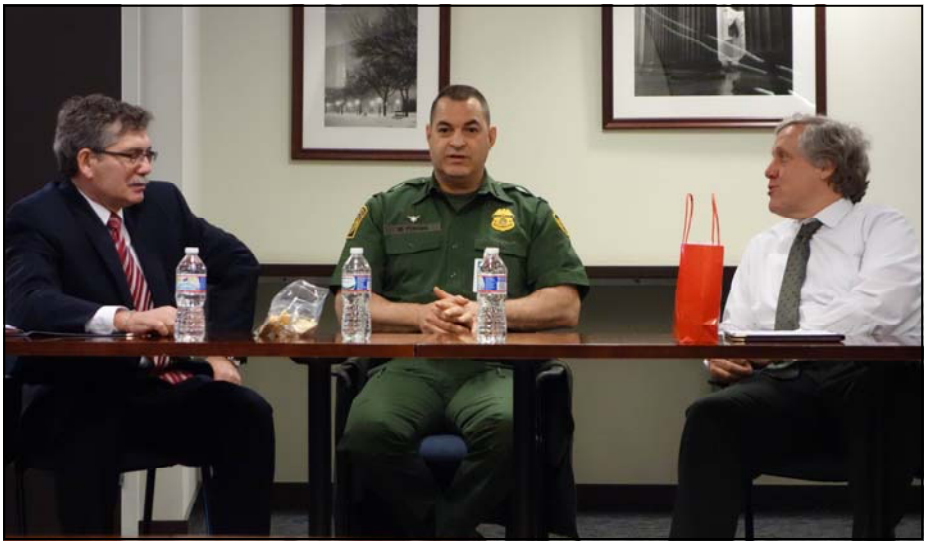
Terri Scadron

U.S. Border Patrol Chief , Michael Fisher Speaks At OIL

The Chief of the United States Border Patrol **Michael J. Fisher** was OIL's special guest at the monthly Brown Bag Lunch & Learn Program.

Chief Fisher is responsible for planning, organizing, coordinating, and directing enforcement efforts designed to secure our Nation's borders. He entered on duty with the U.S. Border Patrol in June 1987. His first duty assignment as a Border Patrol agent was at the Douglas Station in the Tucson Sector. In 2007 he was selected as the Chief Patrol Agent of San Diego Sector. He assumed his current position on May 9, 2010.

The Border Patrol has a workforce of over 21,000 agents assigned to patrol the more than 6,000 miles of America's land borders. The Border Patrol has an operating budget of $1.4 billion, which provides for operations coordinated by 20 sector offices.



Francesco Isgrò, Michael Fisher, David McConnell

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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